IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	)	Chapter 7 Case
	)	Number 85-40555
DIAMOND MANUFACTURING CO., INC.	)	
	)	
Debtor	)	
	)	
WILLIAM H. MOORE, JR.	)	
	)	
Movant	)	
	)	
vs.	)	FILED
	)	at 2 O'clock & 46 min. P.M.
W. JAN JANKOWSKI, CHAPTER 7 TRUSTEE, SIGNET COMMERCIAL CREDIT CORPORATION AND THE UNITED STATES TRUSTEE	)	Date: 11-2-90
	)	
Objecting Respondents	)	

ORDER

Before the court is a motion brought by William H. Moore, Jr. seeking appointment "nunc Pro tunc" as special counsel pursuant to 11 U.S.C. §327(e)[1] for the debtor Diamond Manufacturing Co., Inc.

with regard to previously settled litigation with W. F. Magann Corporation and Aetna Casualty & Surety Company. W. Jan Jankowski, Chapter 7 trustee, Signet Credit

[1]11 U.S.C. §327(e) provides:

> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Commercial Corporation, and the United States Trustee, all parties in interest, object to Mr. Moore's appointment. This is the latest in a series of proceedings in this and other courts involving a dispute between the debtor herein and W.F. Magann Corporation and its surety, Aetna Casualty & Surety Company. For a more detailed history of the litigation see, W.F. Magann Corp. v. Diamond Manufacturing Co., 775 F.2d 1202 (4th Cir. 1985); W.F. Magann Corp. v. Diamond Manufacturing Co., 678 F.Supp. 1197 (D.S.C. 1988); W.F. Magann Corp. v. Diamond Manufacturing Co., 580 F.Supp. 1299 (D.S.C. 1984); In re: Diamond Manufacturing Co. Inc., Chapter 7 bankruptcy case No. 85-40555 slip op. (Bankr. S.D. Ga. June 6, 1990) (hereinafter collectively referenced "Magann litigation"). Based upon the evidence presented at hearing and briefs submitted, this court makes the following findings of fact and conclusions of law.

William H. Moore, Jr. is a practicing attorney. In June, 1981 Mr. Moore became attorney for Diamond Manufacturing Co., Inc., the debtor in this proceeding, representing the debtor's interest along with Mr. Donald E. Austin, the president of the debtor corporation, who is also an attorney, in a dispute with the U.S. Army Corp. of Engineers and W.F. Magan Corporation. According to Mr. Moore, under his initial representation agreement with the debtor, he was to be reimbursed for his out-of-pocket expenses and compensated for his legal services at a One Hundred Fifty and No/100 ($150.00) Dollar per hour rate. This fee arrangement continued until June, 1982 when the debtor became delinquent in its payments to Mr. Moore. In the fall of 1982 Mr. Moore and a management committee, then operating the debtor, altered this representation agreement.

By the fall of 1982 the law firm of Lewis, Babcock, Gregory and Pleicones (hereinafter "Lewis firm") had been retained by the debtor through Mr. Moore to act as lead trial counsel in South Carolina in the Magann litigation. The Lewis firm had agreed to act as trial counsel at an agreed upon hourly rate plus reimbursement for out-of-pocket expenses. According to testimony Mr. Moore's

arrangement with the debtor was altered to a contingency fee arrangement with out-of-pocket expenses to be reimbursed when incurred. According to Mr. Moore the debtor was obligated for attorneys fees in the Magann litigation in an amount not to exceed one-third of any recovery. After the deduction of the fees and expenses paid to the Lewis firm, the remaining legal fee exposure, if any, up to one-third of the gross recovery in the litigation, was

to be divided between Mr. Moore and Mr. Austin.[2] Members of debtor's management committee testified that a contingency fee arrangement was approved with Mr. Moore however the exact terms of that agreement are not clear. Nothing regarding the compensation to be paid to Mr. Moore was ever reduced to writing. It appears that the fee arrangement contemplated an equal participation by the three attorneys, the Lewis firm, Mr. Moore and Mr. Austin in the litigation and in the fee with each allocated 1/9 of any recovery. The exact amount paid to the Lewis firm depended upon their hourly billing. As Mr. Moore accepted a contingency arrangement, his effort devoted to the case would reduce the necessary work required of the Lewis firm with the resulting reduction in their hourly fees thereby increasing his remaining potential contingency fee.

The debtor filed for relief under Chapter 11 of the Bankruptcy Code on August 29, 1985. By order dated September 25, 1986 the Honorable Herman W. Coolidge, then judge of this court, approved the appointment of the Lewis firm as attorneys to represent the debtor in the continuing Magann litigation nunc pro tunc

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[2]By prior order, this court found that, in 1981, the debtor's president and chief executive officer, Donald E. Austin, orally agreed to compensate Mr. Moore in some reasonable fashion for any work expended by Moore in the Magann litigation. See In re: Diamond Manufacturing Co. Inc., slip op. at page 5 (Bankr. S.D. Ga. June 6, 1990). This finding was based upon the testimony of Mr. Austin. Mr. Austin did not testify at the hearing on the motion now under consideration.

in accordance with the terms of the fee agreement and understanding

between the debtor and the attorneys dated December 18, 1984.[3]

Neither the debtor-in-possession nor Mr. Moore ever applied to this court for approval of any representation by Mr. Moore of the estate in the Magann litigation.

By order dated August 26, 1988 this court converted this proceeding to a case under Chapter 7. W. Jan Jankowski was appointed trustee. Subsequent to his appointment, Mr. Jankowski met with Mr. Moore, Mr. George N.P. Pahno, attorney for the debtor in this case, and Mr. Austin and discussed the status of the pending Magann litigation. The trustee did not apply for the appointment of Mr. Moore as counsel for special purpose nor did he take any action to challenge Mr. Moore's continued involvement.

By order dated October 19, 1989 this court approved a settlement of the Magann litigation for a total consideration paid

to the estate of $1,700,000.00. By order dated October 17, 1989,

this court approved compensation from the Magann settlement proceeds

to the Lewis firm in the sum of $320.292.17. See, footnote 3 supra. By order dated June 6, 1990 this court determined, as it pertains to the Magann litigation, that Mr. Austin's:

"work in the Magann litigation was done in his capacity as

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[3]Although the order appointing the Lewis firm [In re Diamond Manufacturing Co.. Inc., Case #85-40555 and In re: Donald E. Austin, Case #85-40639 slip op. (Bankr. S.D. Ga. September 25, 1986)] recites "[d]ebtors filed a motion seeking employment of . . ." the Lewis firm, no such motion was ever filed. Additionally, the order provided that "[a]ny parties in interest which desires to object to this order shall file written objection on or before October 6, 1986 with this Court." The record fails to reflect any service of this order on any interested party to afford an opportunity to object. Pursuant to proper notice this court held a hearing on the Lewis firm's subsequent fee application and no interested party appeared and voiced opposition to the fee application.

> the debtor's chief executive officer and not in his capacity as an attorney. No contract was entered into by the debtor and Austin for legal representation. Under applicable provisions of the Bankruptcy Code, Austin would not have been approved as attorney for the debtor in this court. See 11 U.S.C. §327(e) . . . " In re: Diamond Manufacturing Co.. Inc., Chapter 7 case No. 85-40555 slip op. pp. 13-14 (Bankr. S.D. Ga. June 6, 1990).

In the June 6, 1990 order at page 14 footnote 4 this court further found

> "this court is aware that the Honorable Herman W. Coolidge, Bankruptcy Judge of this court, over objection, appointed Austin as attorney for the debtor in the matter of Rose Marine, Inc., wherein Austin was an officer, director, 90% shareholder and guarantor of at least $500,000.00 of Rose Marine, Inc. debt. However, the appointment provided 'that Donald E. Austin shall serve as attorney for Rose Marine, Inc. without compensation so long as Rose Marine, Inc. shall remain in this court as a debtor under Chapter 11 of the Bankruptcy Code.' In re: Rose Marine Inc., Chapter 7 case No. 8640143 slip op. at 2 (Bankr. S.D. Ga. August 27, 1986)."

Mr. Moore now seeks retroactive appointment as attorney in the Magann litigation and award of compensation pursuant to his prepetition representation agreement with the debtor. The above referenced interested parties object to the retroactive appointment

and award of compensation.

The United States Court of Appeals for the Fifth Circuit as defined the issue before this court.

> The issue . . . is whether the bankruptcy court is bound by a per se rule not to allow compensation for attorney's fees, however valuable they are to the debtor's estate and its creditors, in the absence of a prior court authorization of the attorney's employment, or whether, instead, the court has some discretion, upon proper showing and for good cause to enter an order nunc pro tunc approving the employment of the attorney, as the court might routinely have done had the court's approval been properly sought prior to the performance of the valuable services by the attorney.

Fanelli v. Hensley (In re: Triangle Chemical, Inc.) 697 F.2d 1280, 1282 (5th Cir. 1983). This court follows Triangle, supra, in rejecting the per se rule. In this case, the objecting parties contend that Mr. Moore may not seek approval of his

representation of the estate in the Magann litigation. Pursuant to Bankruptcy Rule 2014[4] only the trustee or debtor-in-possession under 11 U.S.C. §1103, may seek the appointment of counsel. "It is abundantly clear, however, that courts are charged with the responsibility of interpreting statutory language in a manner which gives meaning and purpose to the totality of the statutory scheme. Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 358 (1986); CIR v. Engle, 464 U.S. 206, 104 S.Ct. 597 (1984)." In re: Morgan, Chapter 11 case No. 89-40079 slip op. p. 10 (Bankr. S.D. Ga. August 11, 1989). Sustaining the objections would prevent this court from considering the application of Mr. Moore solely because the application was not brought by the trustee. Such a harsh and rigid application of the rule is not in keeping with the Bankruptcy Court's exercise of its power as a court of equity with equitable principles governing the exercise of its jurisdiction.

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[4]Bankruptcy Rule 2014(a) provides:

> (a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to 327 or 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor,
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> creditors, or any other party in interest, their respective attorneys and accountants. The application shall be a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. (emphasis added)

> "[N]either bankruptcy statute nor rule precludes the bankruptcy judge in the exercise of . . . sound discretion, and as a court of equity administering equitable principles, from entering an order nunc pro tunc authorizing the employment of an attorney for the debtor-in-possession [or trustee] even after the attorney (who should have secured prior approval . . .) has performed valuable services for the debtor's estate and have increased the common funds available for distribution for the creditors." In re: Triangle Chemical, Inc. supra at 1289.

This court has the power on motion brought by the attorney to enter an order retroactively approving the retention of the attorney to represent the interest of the estate, as in this case, for special purpose pursuant to 11 U.S.C. §327(e) upon proper showing of extraordinary circumstances which justify such retroactive appointment. Extraordinary circumstances which justify the retroactive appointment include a determination that (1) the application for employment would otherwise have been approved if timely filed; (2) the failure to seek appropriate employment approval was caused by another party's inaction; (3) the delay in seeking approval was due to circumstances beyond the applicant's control; (4) the parties interested in the bankruptcy proceeding had actual knowledge of the legal services being rendered; and (5) the representation resulted in a significant benefit to the estate. In re: Sinor, 87 B.R. 620 (Bankr. E.D. Cal. 1988). 2 Collier on Bankruptcy ¶327.02 (L. King 15th ed. 1989).

From the facts of this case, Mr. Moore, as attorney for the debtor in the Magann litigation and not as attorney for the debtor in this bankruptcy proceeding, relied upon Mr. Austin, cocounsel in the Magann litigation, president, director and sole shareholder of the debtor corporation to take all steps necessary to protect his interest as counsel. As Mr. Moore was not the attorney for the debtor in the bankruptcy proceeding, he was justified in relying upon the debtor-in-possession to comply with

the requirements of the Bankruptcy Code and Rules. Mr Moore's reliance upon the then debtor-in-possession to secure appropriate protection of his interest as counsel provides a satisfactory explanation for~his failure to receive prior

judicial approval. As co-counsel for the debtor in the Magann litigation, and as previously determined by this court, Mr. Moore devoted substantial time and effort on behalf of the debtor in the Magann litigation. See, In re: Diamond Manufacturing Co.. Inc., Chapter 7 Case #8540555 slip op. at p. 3 (Bankr. S.D. Ga., June 6, 1990). This devotion of time and effort resulted in a substantial recovery by the trustee in the settlement. During the pendency of this proceeding as a Chapter 11 case, the debtor in possession knew of Mr. Moore's involvement in the Magann litigation. Following conversion to a Chapter 7 proceeding the trustee knew of Mr. Moore's continued involvement.

From the testimony of Mr. Lewis of the Lewis firm, the lead trial attorney in the Magann litigation, Mr. Moore's participation was critical to the success of the case and resulted in a significant benefit to the estate. As Mr. Moore's participation in the case was crucial for success, approval of his representation would have occurred if timely filed. To deny Mr. Moore compensation for his services now that the litigation has successfully concluded with substantial benefit to the estate would render an undue hardship to Mr Moore not justified under basic

principles of equity. From the evidence presented, the appointment of Mr. Moore as attorney for special purpose was in the best interest of the estate and Mr. Moore did not represent an interest adverse to the debtor or to the estate with respect to the Magann litigation.

Having determined that retroactive appointment of Mr. Moore as attorney for the estate in the Magann litigation should be approved, as the litigation has concluded and the trustee now holds the proceeds from the litigation, this court must determine the prepetition agreement between the debtor and Mr. Moore and whether compensation payable under that agreement is reasonable. 11 U.S.C. §328(a) & §329[5]. From the testimony of Mr. Moore and members of the

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[5]11 U.S.C. §328(a) provides:

> (a) The trustee,-or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the

debtor's management committee as well as the prior testimony and determination made by this court as to Mr. Austin's understanding of the fee agreement, this court

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> employment of a professional person under section 327 or 1103 of this title or, as the case may be, on any reasonable terms and conditions of employment including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. §329 provides:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to
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> (1) the estate, if the property transferred
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> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
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> (C) the entity that made such payment.

concludes that a contingency arrangement was arrived at with Mr. Moore but the exact terms of the agreement are unclear because the terms were never finalized. It is clear that the debtor was partially limited in its exposure for attorneys fees. The Lewis firm was to be paid its agreed upon hourly rate with any excess fees payable to the remaining involved attorneys. Fees to remaining counsel were limited to an amount not to exceed the difference between the fees paid to the Lewis firm and one-third of the recovery. This represented the maximum exposure of the debtor for attorneys fees not an agreed upon fee amount. As

previously testified to by Mr. Austin, Mr. Moore was to be reasonably compensated from any recovery realized. It now falls to; this court to determine such reasonable compensation.

The vast majority of Mr. Moore's participation in the Magann litigation involved case preparation for trial. Moore did assist the Lewis firm at the first trial and prepared one segment of the brief on the first appeal to the Court of Appeals for the Fourth Circuit. The Lewis firm was lead counsel in the first trial, principally responsible for the first appeal, sole counsel on the second trial and solely responsible for the second appeal. The Lewis firm was principally responsible for the Magann litigation and its substantial fee request was well documented and justified. Mr. Moore's application and proof of claim are not. Considering the fees paid to the Lewis firm on its; application, the contingent nature of Mr. Moore's continued representation, the fact that Mr. Austin could not have been approved as attorney for the debtor in the Magann litigation and participated in the Magann litigation in his capacity as an officer of the debtor corporation, and the maximum exposure for attorneys fees to the debtor which included Mr. Austin's participation as counsel, this court determines that the

maximum reasonable attorney's fees to be paid from the Magann litigation proceeds should not exceed Three Hundred Seventy-Seven Thousand Seven Hundred Seventy-Seven and 78/100 ($377,777.78) Dollars (two-ninths of the recovery). Under this determination Mr. Moore's fee would not exceed Fifty Seven Thousand Four Hundred Eighty-Five and 61/100 ($57,485.61)[6] Dollars which compensation is reasonable. 11 U.S.C. §330(a)[7].

Mr. Moore's representation of the estate in the~Magann litigation was in the best interest of the estate and he did not represent an interest adverse to the estate's interest in the litigation. Retroactive appointment is appropriate. Mr. Moore's allowed compensation is Fifty Seven Thousand Four Hundred Eighty

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[6]Mr. Moore's allowed attorney's fees are calculated as follows:

Maximum attorney's fee exposure		
1/3 of $1,700,000.00	=	566,666.67
Mr. Austin's 1/9 fee participation		
not chargeable against the estate	-	188 888.89
		377,777.78
Lewis firm award	-	320.292.17
Balance for Mr. Moore's compensation		$57,485.61

[7]11 U.S.C. §330(a) provides in pertinent part:

> (a) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328 and 329 of this title [11], the court may award to . . . a professional person employed under section 327 . . . of this title [11] . . .
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> (1) reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title [11] . . .

Five and 61/100 (57,485.61) Dollars. Under the requirements of 11 U.S.C. §327(e); 328(a), 329(b) and 330(a) this compensation is reasonable and the maximum awardable in light of the services provided.

It is therefore ORDERED that all objections are overruled and Mr. William H. Moore is appointed retroactive to August 29, 1985 attorney for the estate in the Magann litigation.

Further ORDERED that the trustee, Mr. W. Jan Jankowski, pay to Mr. Julian Toporek, attorney for Mr. Moore in this motion, from the Magann litigation proceeds, the sum of Fifty-Seven Thousand Four Hundred Eighty-Five and 61/100 ($57,485.61) Dollars.

Further ORDERED that as this compensation represents all reasonable compensation due Mr. Moore from the estate in this case, his filed proof of claim is disallowed.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 2nd day of November, 1990.